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In the
Supreme Court of the United States
October Term, 2004

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No. 04-1034 *consolidated with* No. 04-1384

JOHN A. RAPANOS *et al.*,
Petitioners,
v.
UNITED STATES,
Respondent.

JUNE CARABELL *et al.*,
Petitioners,
v.
UNITED STATES ARMY
CORPS OF ENGINEERS
et al.,
Respondents.

On Writs of *Certiorari* to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIÆ* CHARLES R. JOHNSON, ATLANTIC LEGAL FOUNDATION, DEFENDERS OF PROPERTY RIGHTS, AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS ON THE MERITS

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QUESTIONS PRESENTED

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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INTEREST OF *AMICI CURIÆ*

Amici Charles R. Johnson ("Johnson"), Atlantic Legal Foundation ("Atlantic Legal"), Defenders of Property Rights ("Defenders"), and New England Legal Foundation ("NELF") seek to bring to the Court's attention their views, and the views of their supporters, concerning the authority of the Army Corps of Engineers to regulate filling of inland wetlands under 33 U.S.C. § 1344, Section 404 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA").[1]

1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that neither counsel for Petitioners nor Respondent authored this Brief in whole

Amicus Curiæ Charles R. Johnson is a 73 year-old cranberry farmer from Carver, Massachusetts. He purchased his first cranberry bog in 1958 and currently farms approximately 140 acres of cranberry bogs. *The Wetlands Permitting Process: Is It Working Fairly: Hearing Before the Subcommittee on Water Resources & Environment of the House Committee on Transportation and Infrastructure*, 107th Cong. 56 (Oct. 3, 2001) (statement of Charles R. Johnson) ("*Wetland Permitting Process*").

In 1999, the Environmental Protection Agency ("EPA") commenced a civil case in the United States District Court for the District of Massachusetts against Mr. Johnson, his wife, his son, and a family-owned limited partnership (collectively, "the Johnsons") for filling activity in wetlands associated with the creation and maintenance of his cranberry bogs, allegedly without a required permit under Section 404 of the Clean Water Act ("CWA"), 31 U.S.C. § 1344. *United States v. Charles Johnson et al.*, Civ. No. 99-12465-EFH (D. Mass.).

The Johnsons' principal defense to liability was that the cranberry bogs in question are remote from navigable waters and the only water flow from their property to the nearest navigable waterway was indirect, through a series of unnavigable (and often unnamed) tributaries. In other words, their argument is similar to that of the Petitioners that their property is too remote from navigable waters to come within EPA authority under Section 404 of the CWA, as clarified by this Court's decision in *Solid Waste Agency of Northern Cook*

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or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3 (a), counsel for *Amici* have submitted consents by both parties to the filing of this Brief.

County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("*SWANCC*").

The District Court granted partial summary judgment against the Johnsons on liability by order of May 6, 2004, and summary judgment on remedy by order of January 13, 2005. On March 22, 2005, the Johnsons filed their notice of appeal to the United States Court of Appeals for the First Circuit, where the case is now pending. *United States v. Johnson*, No. 05-1444 (1st Cir.).

Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm incorporated in Pennsylvania in 1976. Its mission is to advance the rule of law by advocating limited, effective government, free enterprise, individual liberty, school choice, and sound science. Atlantic Legal's goal is to advance the cause of economic and individual freedom by making government—federal, state, and local—more accountable and less intrusive. Atlantic Legal seeks to advance these goals through litigation and public advocacy and education. Atlantic Legal provides *pro bono* legal representation to individuals, corporations, trade associations, and similar groups.

Atlantic Legal's supporters include individuals, business enterprises and philanthropic foundations. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, business executives, retired public officials and judges, and prominent scientists.

Atlantic Legal has appeared in this Court and in numerous federal and state appellate courts as an *amicus* or as counsel to *amici*. Among the cases in this Court involving property rights, excessive regulation of land use, or environmental regulation in which Atlantic Legal has appeared

include *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *RCK Properties, f/k/a Forest Properties v. United States*, 528 U.S. 951 (1999); *Cole v. County of Santa Barbara*, 537 U.S. 973 (2002); *Hansen v. United States*, 535 U.S. 1111 (2002); and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

Other cases in this Court involving issues of constitutional or public policy importance in which Atlantic Legal has appeared as *amicus* or counsel for *amici* include *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S.217 (2000); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); and *Rumsfeld v. Forum for Academic and Institutional Rights*, No. 04-1152 (October Term 2005).

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991 and has 23,000 members. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Since its inception, Defenders has participated in every major property rights case before the U.S. Supreme Court. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S.

Ct. 2764 (2005); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S. Ct. 2491 (2005); *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon a fair balance of regulation in regard to property development and growth. A healthy real estate development climate is a mark of a vital and vibrant economy and depends on secure rights for property owners. Furthermore, some of NELF's members are directly interested in the issue of real estate development and land use

because they are involved in developing, owning, managing, insuring, and/or financing real property.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Kelo v. City of New London,* 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 125 S. Ct. 2491 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 125 S. Ct. 1517 (2005); *Commissioner v. Banks,* 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000).

Amici believe that the protection of owners' rights to reasonable development are important building blocks of democracy. The appearance of *Amici* in these consolidated cases is desirable to provide the Court with a public policy perspective that Clean Water Act section 404 authority should not be interpreted to extend federal regulation to encompass virtually every body of water, no matter how remotely and tenuously "connected" to a navigable waterway and to intrude upon local land use regulation. The potential for duplicative land-use regulation by both the state and federal governments imposes significant costs on property owners and developers.

Amici Curiæ therefore believe that this brief provides an additional perspective which may aid the Court in determining the issues raised in the petitions of the petitioners in these consolidated cases (collectively "Petitioners"): John A. Rapanos *et al.* (the "Rapanoses") and June Carabell *et al.* (the "Carabells").

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Briefs of Petitioners.

SUMMARY OF ARGUMENT

These cases deal with the extent of the United States Army Corps of Engineers' authority to regulate the dredging and filling of inland wetlands under the CWA, 33 U.S.C. §§ 1251 *et seq.* ("CWA"). In a recent decision, this Court restricted the Corps' authority to regulate inland wetlands. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). Since then, the Corps has attempted to avoid the teaching of *SWANCC* by relying on an alternative theory—the "Hydrologic Connection Rule," that would extend regulatory authority to any wetland with a "hydrological connection," direct or indirect, with navigable waters. The Corps thereby seeks to retain its asserted authority over virtually all inland wetlands. The Court of Appeals for the Sixth Circuit held below that even though Rapanos' lands are 20 miles from "navigable-in-fact water," *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003), *cert. denied*, 451 U.S. 972 (2004), they are within the jurisdiction of the Corps under the CWA because they share a so-called "hydrological connection" with the distant rivers. This supposed "connection" between one parcel of property and a distant navigable river is remote to at least the third degree: In *Rapanos*, "[t]he wetlands are connected to the Labozinski Drain (a one hundred year-old man-made *drain*) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable. The Kawkawlin *eventually* flows into Saginaw Bay and Lake Huron." 339 F.3d at 449 (emphasis added). In *Carabell*, the wetlands are "connected" by

groundwater flow through a man-made berm to an "unnamed ditch . . . connected to the Sutherland-Oemig Drain, [which] empties into the Auvase Creek, which, in turn, empties into Lake St. Clair, which connects to Lake Huron and Lake Erie." *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 708 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005). By its silence, the Court of Appeals indicated that neither the "drains" nor the "creeks" are navigable.

Moreover, the Corps' interpretation of the CWA raises serious constitutional implications under Commerce Clause jurisprudence, as reiterated by this Court in *SWANCC*. Nationwide federal wetland jurisdiction impinges on the traditional police powers of state and local governments over land-use decisions. This court should therefore interpret the CWA as limited to navigable-in-fact waterways and wetlands immediately adjacent thereto in order to avoid possible constitutional problems.

Amici argue that the Fifth Circuit's interpretation of the CWA, which limits the Corps' authority to wetlands that are *adjacent* to national navigable waterways, is in accord with Congress's intent as correctly set forth in this Court's precedents.

ARGUMENT

I. The "hydrological connection rule," which would extend the Corps' regulatory authority to all inland wetlands, is inconsistent with this Court's holding that the Corps' dredge-and-fill authority is limited to wetlands adjacent to navigable waters.

Amici argue that the Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA")

violate Congress's intent, as explicated by this Court in *SWANCC*, by interpreting the CWA to allow them to regulate work in wetlands that are not immediately adjacent to navigable-in-fact federal waters. Section 404 of the CWA, 33 U.S.C. § 1344, gives the Army Corps of Engineers authority to grant permits for work in wetlands, as part of its authorization to regulate dredging or filling activity in "navigable waters." The EPA is the agency charged with enforcing the CWA, including commencing administrative and court proceedings for alleged violations of Section 404 permitting rules. *Id.* The original regulations issued by the Corps under the CWA in 1974 claimed modest geographic coverage of "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120 (d) (1) (1975). *See SWANCC*, 531 U.S. at 168.

By 1977, the Corps had considerably expanded its asserted authority to "isolated wetlands." 33 C.F.R. § 323.2 (a) (5) (1978). *See SWANCC*, 531 U.S. at 168–69. In 1986, the Corps promulgated the "migratory bird rule" as a "regulatory clarification" of its expansive claims of regulatory authority. 51 Fed. Reg. 41217 (1986). *See SWANCC*, 531 U.S. at 164. The Corps maintained that the "migratory bird rule" extended CWA regulatory authority to any waters used as habitat for migratory birds. *SWANCC*, 531 U.S. at 164. Because migratory birds utilize virtually every wetland, the Corps used the rule to extend its authority over dredging and filling to virtually all wetlands nationwide, no matter how remote from navigable-in-fact waters.

CWA prohibits unauthorized discharges "into the navigable waters." 33 U.S.C. § 1344(a). In this Court's

jurisprudence concerning the Nation's waterways, the term of art "navigable" has had one meaning: whether the waters in question can be traversed or reasonably be made traversable by boat. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–09 (1940); *Economy Light and Power Co. v. United States*, 256 U.S. 113, 122–23 (1921); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Just four years ago, this Court recognized that the holding of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985), expanded the meaning of "navigable" slightly, but emphasized that it did not intend to "read[] the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. "[W]hen a statute uses . . . a term, Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

Although this Court had said in *Riverside Bayview Homes* that the word "navigable" in 33 U.S.C. § 1344 (a) was of "limited effect," in *SWANCC* it recognized that "it is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172. This Court explained that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

In *SWANCC*, this Court restricted the Corps' expansive geographic extension of its Section 404 regulatory authority by invalidating the "migratory bird rule." *SWANCC* decided that the Corps could not interpret the CWA to exercise the authority to regulate wetlands formed by an abandoned gravel mining operation in metropolitan Chicago, simply because migratory aquatic birds used the site for habitat. *SWANCC*, 531

U.S. at 163, 171–72. The Corps had claimed that because there were commercial activities associated with migratory birds and those birds landed on the pond in question, the pond affected interstate commerce. This Court rejected that argument, finding that there was "no persuasive evidence" that Congress ever acquiesced to "the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters." *SWANCC*, 531 U.S. at 171. The Court "decline[d] respondents' invitation to . . . hold[] that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404 (a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." *Id.* at 171–72. The Court made it clear that isolated ponds are not subject to the CWA.

After *SWANCC*, the Corps and the EPA sought to limit that decision exclusively to its particular facts and the specific Corps policy at issue in *SWANCC*, the "migratory bird rule." They did not eschew their claim of virtually universal regulatory authority over wetlands; indeed, the Corps and EPA have expressly adopted an agenda to prevent any conversion of wetlands to development anywhere in the nation, irrespective of proximity to navigable waters. United States Army Corps of Engineers, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach to Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*, News Release (Jan. 10, 2003), *available at* http://www.usace.army.mil/inet/functions/cw/hot_topics/admin_affirm_nr.pdf. To maintain their assertion of expansive authority over wetlands wherever located, the Corps and the EPA now rely on the "hydrological connection rule" in these and other cases. In doing so, they are merely using a different vehicle to reach a result already invalidated by the *SWANCC*

decision.[2]

The "hydrological connection rule" is a Corps policy, not formally adopted as a regulation,[3] that treats wetlands as "navigable waters" under the Section 404, so long as water from the wetlands flows, however intermittently or indirectly, to navigable or tidal waters. *See United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (2005); *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). The meaning of "hydrological connection," as used by the Corps and EPA as a basis of regulatory authority is open-ended and expansive. There is no discernable end point to this approach other than the inclusion of virtually every body of water.[4]

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2 The adverse effects on ordinary citizens, including Petitioners, of the Corps and EPA's overly broad and heavy-handed approach to its CWA authority were the subject of in-depth discussions during Congressional hearings shortly after the *SWANCC* decision. *See The Wetlands Permitting Process: Is It Working Fairly: Hearing Before the Subcommittee on Water Resources & Environment of the House Committee on Transportation and Infrastructure*, 107th Cong. 56 (Oct. 3, 2001). *Amicus* Charles R. Johnson was one of the witnesses at the hearing.

3 The "hydrological connection rule" is an administrative interpretation of the Corps' regulation extending its Section 404 authority to waters that contribute some flow of water to navigable waterways. 33 C.F.R. § 300.5 (d). *See In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003).

4 A number of courts have held that a "hydrological connection" to navigable waters includes connection through groundwater flows. *See, e.g., Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1178–80 (D. Idaho 2001) (interpreting *SWANCC*; "[T]he CWA extends federal regulatory authority over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States."); Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 Envt'l L. 113, 134–35 (2003). In other courts, the EPA has urged a definition of "hydrologically connected" that would exclude groundwater flows. *See, e.g.,*

With certain limited exceptions (primarily the Great Basin area centered on Nevada and Utah)[5] virtually all the territory of the United States is within the watershed of either the Atlantic or the Pacific Ocean and therefore ultimately hydrologically connected with a navigable waterway. *See Continental Divide,* available at http://answers.com/topic/continental-divide-1&method=6; Columbia Encyclopedia, *Watershed,* available at http://www.bartleby.com/65/wa/watershe.html. The "hydrological connection rule" would expand Section 404 permitting authority to virtually all wetlands in the United States outside the Great Basin area.[6] As

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In re Needham, 354 F.3d 340, 345 (5th Cir. 2003); Craig, 33 Envt'l L. at 132–34. There is, in fact, no scientific basis for distinguishing between ground and surface waters. Conservation Technology Information Center, Perdue University, *Groundwater & Surface Water: Understanding the Interaction,* available at http://www.ctic.purdue.edu/KYW/Brochures/GroundSurface.html ("About 40% of river flow nationwide (on average) depends on groundwater.... Groundwater and surface water are fundamentally interconnected. In fact, it is often difficult to separate the two because they 'feed' each other. This is why one can contaminate the other."). The Army Corps has effectively conceded that there is no rational distinction between groundwater and surface water flows by asserting authority over wetlands such as those at issue in *Carabell,* which connect to surface waters ultimately connected to navigable-in-fact waters only through groundwater flows (in this case through a man-made berm). *See Carabell,* 391 F.3d at 708–09.

5 The Great Basin includes Utah's Great Salt Lake and California's Death Valley. *See* United States Geological Survey, *Geological Provinces of the United States: Basin & Range Province,* available at http://wrgis.wr.usgs.gov/docs/parks/province/basinrange.html; *Great Basin,* available at http://www.answers.com/topic/great-basin. Precipitation falling in the Great Basin, unlike that in the rest of the nation, stays within the Great Basin watershed and fails to flow ultimately towards either the Atlantic or Pacific Oceans. *Id.*

6 A proposed federal regulation intended to assert the Corps' post-*SWANCC* Section 404 regulatory authority would have covered

noted by the United States District Court for the Eastern District of Michigan, however, the artificial ponds at issue in *SWANCC* were hydrologically connected to neighboring navigable waters, apparently Lake Michigan, presumably through groundwater flows:

> It is worth noting that the majority opinion in [*SWANCC*] repeatedly refers to the wetlands at issue in that case as "isolated," despite the fact that, as the dissent points out, even the most seemingly "isolated" wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters. *See* [*SWANCC*], 531 U.S. at 176 n.2 (Stevens, J., dissenting). The dissent notes that the wetlands in [*SWANCC*] are at least ecologically connected. *See id.* Despite this, the majority still refers to the wetlands as isolated, indicating what is likely a significant shift in its CWA jurisprudence. This leads the Court to conclude that even if there is a hydrological connection, Defendant's wetlands may be considered "isolated" for purposes of the CWA.

United States v. Rapanos, 190 F. Supp. 2d 1011, 1014 n.3 (E.D. Mich. 2002), *rev'd*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). *Accord FD & P Ents., Inc. v. United States Army Corps of Engineers*, 239 F. Supp. 2d 509, 514 (D.N.J. 2003).

This Court should follow the logic of *SWANCC* as

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approximately eighty percent of all wetlands nationwide. Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 Ecology L.Q. 811, 816 & n.18 (2003).

interpreted by the Court of Appeals for the Fifth Circuit. The Fifth Circuit has disallowed the Corps' expansive "hydrological connection rule." *See In re Needham*, 354 F.3d 340, 345–46 (5th Cir. 2003) ("[T]he United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . [only] if the body of water is *actually* navigable or *adjacent* to an open body of navigable water.'" (emphasis added) (quoting *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)). *Accord FD & P Ents.*, 239 F. Supp. 2d at 526. The Fifth Circuit has given full recognition to the fact that this Court in *SWANCC* confined CWA regulatory authority to historically navigable and the tidal water bodies and wetlands abutting them:

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But, we conclude that the text of the statute will not allow this.

SWANCC, 531 U.S. at 168 (emphasis in original). The Fifth Circuit persuasively construed Congress's intent to limit CWA regulatory authority to wetlands immediately adjacent to navigable-in-fact waters. *In re Needham*, 354 F.3d at 346.

Amici acknowledge that a number of other courts of appeals have agreed with the EPA and the Corps in adopting an improperly narrow reading of *SWANCC*, limiting it to the invalidation of the "migratory bird rule." *Rapanos*, 376 F.3d at 638. *Accord Carabell v. United States Army Corps of Eng'rs*, 391 F.3d 704, 709–10 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Reuth Dev. Co.*,

335 F.3d 598, 604 (7th Cir.), *cert. denied*, 540 U.S. 1050 (2003); *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 533–34 (9th Cir. 2001); *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415 (4th Cir. 2000). These courts have allowed the EPA and the Corps to use an expansive "hydrological connection rule" to reassert virtually nationwide federal wetland regulation. They have dismissed as mere *dicta* this Court's teachings in *SWANCC* that criticize wide-ranging CWA Section 404 authority. *See Rapanos*, 376 F.3d at 638–39. As even environmental advocates acknowledge, however, the meaning of *SWANCC* is clear: the application of the Section 404 to wetlands not contiguous to navigable-in-fact waters is extremely limited. *See* Brian Knutsen, *Asserting Clean Water Act Jurisdiction over Isolated Waters: What Happens after the SWANCC Decision*, 10 Alb. L. Envtl. Outlook J. 155, text accompanying nn.136, 182–83, 228 (2005) (authority limited to nonnavigable waters with a "significant nexus" to actually navigable waters and "inseparably bound up" with navigable waters (quoting *SWANCC*, 531 U.S. at 167); under current regulations covered wetlands must actually be "neighboring" navigable waters).[7]

Regulatory history further supports restricted CWA authority over waters distant from and indirectly connected to navigable-in-fact waters such as those involved in these cases.

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7 "While this may allow jurisdiction over some wetlands that are not immediately adjacent in the traditional sense of the word, the majority of these isolated waters will be left outside the coverage of the current regulations." Knutsen, 10 Alb. L. Envtl. Outlook J. at text accompanying n.183. *SWANCC* "seems to suggest that wetlands that are not 'adjacent' to some sort of open water—presumably a jurisdictional body of surface water—cannot be regulated under the statute. This would exclude from the CWA any waters that are not adjacent to other jurisdictional waters . . . ." *Id.* at text accompanying n.228.

As this Court has pointed out:

> [T]he Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined sec. 404 (a)'s "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120 (d) (1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." Sec. 209.260 (e) (1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.

SWANCC, 531 U.S. at 168 (emphasis in original). The relevance of the Corps' original interpretation of the CWA to the "migratory bird rule" applies with equal vigor to the "hydrological connection" theory.

Notably, not only are the Rapanoses' and the Carabells' properties distant from navigable-in-fact waters, but the Corps has made no attempt in these cases to show that the Rapanoses' and Carabells' conduct had any adverse effect on navigation or commerce (as opposed to water quality) of the nearest navigable waterways.

II. The dredge and fill permit requirements under Section 404 of the Clean Water Act can extend only to wetlands adjacent to actual navigable and tidal waters.

This Court in *SWANCC* acknowledged that expansive CWA regulatory authority raised significant, constitutionally based federalism issues. *SWANCC*, 531 U.S. at 172–73. The CWA rests on Congress's power to regulate navigation under the Commerce Clause, Const. Art. I, § 8, cl. 3. *See SWANCC*, 531 U.S. at 168 n.3 (nothing "in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation."). *SWANCC* recognized the constitutional limitation on regulatory authority under the CWA. *SWANCC*, 531 U.S. at 173 ("Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.") (citing *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995)).

This Court has recognized that the "traditional and primary power over land and water use" resides with the States: "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .'" *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251 (b)). This Court "*always* ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison*, 529 U.S. at 618–19 (emphasis in original) (quoting *Lopez*, 514 U.S. at 584–85 (Thomas, J., concurring)). The attempted creation of a police power over the waters that are not really navigable at all, and do not have a measurable effect on the economic activities of one or more States connected to interstate commerce, goes well

beyond the constitutionally limited powers of the federal government.

Lopez and *Morrison* were recently construed in *Gonzalez v. Raich*, 125 S. Ct. 2195 (2005), in which this Court reiterated the longstanding division of permissible federal regulation under Commerce Clause into three categories:

> First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.

Raich, 125 S. Ct. at 2205 (citations omitted). *See Lopez*, 514 U.S. at 558. In *SWANCC*, the agencies relied entirely on the third category (substantially affects interstate commerce). *SWANCC*, 531 U.S. at 173. This Court rejected that argument *SWANCC*, 531 U.S. at 173.[8] Therefore, in these cases the agencies purport

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8 This Court declined to interpret the CWA to grant the agencies regulatory authority under the "migratory bird rule" because, to do so, it:

> would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.

to rely primarily on "channels of interstate commerce." *Rapanos v. United States*, No. 04-1034, United States Brief in Opposition to Petition for *Certiorari* ("United States Petition Opposition Brief") at 23.[9] In substance, however, in these cases, the agencies continue to rely on the aggregate effects on downstream waters under the third category, *id.*, contrary to this Court's teaching in *SWANCC*. They have simply substituted "hydrological connection" for migratory birds in selecting the method by which they claim interstate commerce is affected.

Indeed, "channels of interstate commerce," the category now principally relied on by the agencies, was in fact dismissed as a relevant basis of CWA regulatory authority by the United States Court of Appeals for the Fourth Circuit in *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997), a decision presaging *SWANCC*. The court determined that, "Congress may also regulate the discharge of pollutants into *nonnavigable* waters," only "to the extent necessary to protect the use or potential use of *navigable* waters as channels or instrumentalities of interstate commerce . . . ." *Id.* (emphasis in original). In other words, the regulation of "channels of interstate commerce" must be for direct purpose of enhancing navigation and commerce, which regulation of the wetlands at issue in these cases does not

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SWANCC, 531 U.S. at 173 (citation omitted). At least one author has opined that, after *SWANCC*, only regulations issued pursuant to the first category (channels of interstate commerce) really apply under the CWA. *See* Knutsen, 10 Alb. L. Envtl. Outlook J. at text accompanying nn. 116–19 ("It appears that the Court views the CWA to only reach waters where jurisdiction is asserted through . . . 'the use of channels of interstate commerce.'").

9 *Raich*, which concerns solely the third category (substantially affects interstate commerce), is this largely distinguishable from these cases. *Raich*, 125 S. Ct. at 2205.

affect. The agencies claim authority, on the other hand, by asserting that any discharge of a pollutant into any water remotely hydrologically connected to a navigable water has an "aggregate" effect on "hydrological and ecological functions" downstream. United States Petition Opposition Brief at 24. As stated in *Wilson*, however, permissible federal regulation must have as its purpose the enhancement of *navigation* and *commerce*, as aspects of the federal commerce jurisdiction. 133 F.3d at 254. Hydrological and ecological aspects of water quality, on the other hand, are environmental goals primarily under the auspices of the states. 33 U.S.C. § 1251 (b).[10] Courts have repeatedly held, however, that land-use and water-use regulation is primarily a state and local concern under federalism jurisprudence: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. The agencies' position in this case is thus an attempted reincarnation of their reliance on unmeasured downstream effects, which was found untenable by this Court in *SWANCC*, 531 U.S. at 173.

The federal government is a government of limited authority under the Constitution. The Commerce Clause cannot be read to grant general police powers to the federal government simply because an activity might have some remote economic consequences. *Lopez*, 514 U.S. at 567–68. The

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10 "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251 (b).

Commerce Clause regulates only "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. Congress's interstate commerce power, therefore, permits only regulation of navigation and potential navigational impacts through the CWA. *See Morrison*, 529 U.S. at 613. It is the states, on the other hand, whose police powers are primary in regard to protection of the environment.

The "hydrological connection rule," as applied in these cases, asserts federal regulatory authority over all wetlands nationwide that potentially fall in the watershed of either the Atlantic or Pacific Oceans. A subsequently withdrawn joint Corps and EPA proposal attempted to extended federal authority over 80 percent of all wetlands nationwide, negating the effect of *SWANCC*. Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 Ecology L.Q. 811, 816 & n. 18 (2003). Environmental advocates urged even broader coverage. *Id.* Subsequently, the EPA and Corps explicitly espoused a goal of no net loss of wetlands nationwide. United States Army Corps of Engineers, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach to Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*. The "hydrological connection rule" would result in federal police power over land use that this Court cautioned against in *SWANCC*, 531 U.S. at 574. The agencies' interpretation of the CWA would impose a land-use regime where "there never will be a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567–68.

By equating anything with a "hydrological connection" to a navigable water to "navigable water" itself, the Sixth

Circuit has completely disregarded this Court's teaching in *SWANCC* and removed all meaning from the term "navigable." Removing the obvious and correct meaning of "navigable" from the CWA raises "serious constitutional problems." *SWANCC*, 531 U.S. at 173 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The reasonable interpretation of the CWA, to avoid unnecessary implication of constitutional principles, should exclude federal regulatory jurisdiction over isolated inland water bodies such as those at issue in *Rapanos* and *Carabell*.

CONCLUSION

For the reasons stated above, this Court should reverse the decisions of the Court of Appeals for the Sixth Circuit below.

Respectfully submitted,

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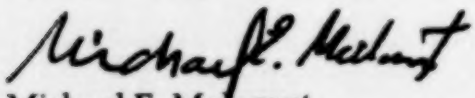
By their attorneys,



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